(1)

Supreme Court, U.S.
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Case Number _____

IN THE

Supreme Court of the United States

CARL E. NICHOLSON

Petitioner,

vs.

DAVID J. BODNEY; PETER B. SWANN; PATRICIA ROBINSON; STEPTOE & JOHNSON; BAKER & HOSTETLER; DAVID M. GILES; BRUCE W. SANFORD; GLEN A. SMITH; KATHRYN E. UNDERWOOD; SCRIPPS HOWARD BROADCASTING CORPORATION; KNXV-TV; CHRIS HEINBAUGH;SUSAN SULLIVAN; JEFF KLOTZMAN; MICHAEL KRONLEY; BRAD NILSEN,

Respondents.

On Petition for Writ of Certiorari to the United States Court Of Appeals For The Ninth Circuit

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Petition for Writ of Certiorari

CARL E. NICHOLSON
Petitioner, Pro se
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65 pp

QUESTIONS PRESENTED

1. Whether the Trial Court Clearly Erred By Refusing To Instruct Pro Se Petitioner On How to Amend Complaint.

2. Whether the Trial Court and the Appeals Court Misapplied Arizona Law to the Facts.

3. Whether the Trial Court and the Appeals Court Clearly Erred In Refusing to Consider the Non-Conclusory Materials Provided as Exhibits to Supplement the Pro Se Petitioner's Complaint.

4. Whether the Trial Court and the Appeals Court Erred In Their Interpretation of Arizona Law Concerning Respondents' Claims of "Absolute Immunity".

5. Whether the Appeals Court Clearly Abused Its Discretion By Refusing to Consider Petitioner's Emergency Motion For Disqualification Of Counsel, and For Sanctions.

6. Whether the Appeals Court Panel Abused Its Discretion By Not Allowing the Full Court to Consider Whether to Allow a Hearing En Banc.

7. Whether the District Court or the Appeals Court Erred When They Failed to Give Proper Consideration to the Pro Se Status of Petitioner.

List of Parties to the Proceeding

1). David J. Bodney
2). Peter B. Swann
3). Patricia Robinson
4). Steptoe & Johnson LLP
5). Baker & Hostetler LLP
6). David M. Giles
7). Bruce W. Sanford
8). Glen A. Smith
9). Kathryn E. Underwood
10). Scripps Howard Corporation
11). KNXV-TV
12). Jeff Klotzman
13). Michael Kronley
14). Brad Nilsen

Corporate Disclosure Statement

Petitioner, Carl E. Nicholson is not a corporate party to this action.

TABLE OF CONTENTS *Page*

QUESTIONS PRESENTED.....*i*
LIST OF PARTIES TO THE PROCEEDING.....*ii*
CORPORATE DISCLOSURE STATEMENT.....*ii*
TABLE OF CONTENTS.....*iii*
TABLE OF CITED AUTHORITIES.....*iv*
TABLE OF APPENDICES.....*v*
OPINIONS BELOW.....*vii*
STATEMENT OF JURISDICTION.....*vii*
STATUTORY PROVISION INVOLVED.....*vii*
STATEMENT OF THE CASE.....1
REASONS FOR GRANTING THE WRIT.....24

1. **The Petition Should Be Granted Because The Opinion Below Conflicts With Decisions Of This Court And Those Of All Twelve Circuits On A Matter Of Nationwide Importance To All Pro Se Litigants Unable To Afford Legal Counsel But Also Of Great Significance To All Victims Of Civil Rights Violations Filing Claims Under 42 U.S.C. Section 1983. The Writ Should Also Be Granted Because The Opinion Was Also Decided In A Way That Conflicts With Multiple Decisions Of The Supreme Court Of The State Of Arizona.**

Appendix.....26

TABLE OF CITED AUTHORITIES

Page

Cases:

1) **Linder v. Brown & Herrick, 943 P. 2d (Ariz. App. 1997).....24**

2) **Giles v. Hill Lewis Marce, 988 P.2d 147 (Ariz App. 1999); review denied (Ariz. Sup. Ct. 1999).....24**

3) **Kimes v. Stone, 84 F. 3d 1121, 1126 (9th Cir. 1996).....24**

TABLE OF APPENDICES

APPENDIX A----OPINION—UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED DECEMBER 27, 1999.....Page 1a

APPENDIX B-----JUDGMENT—UNITED STATES COURT OF APPEALSFOR THE NINTH CIRCUIT DATED FEBRUARY 8, 2000.....Page 4a

APPENDIX C-----ORDER--UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED MARCH 13, 2000.....Page 5a

APPENDIX D-NOTICE-UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT—OF DEFECTIVE PETITION FOR REHEARING DATED JANUARY 24, 2000.....Page 6a

APPENDIX E ORDER UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUI DATED SEPTEMBER 7, 2000.....Page 7a

APPENDIX F—ORDER—U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED SEPTEMBER 20, 1998.....Page 8a

APPENDIX G-JUDGMENT-U.S. DISTRICT COURT DISTRICT OF ARIZONA DATED SEPTEMBER 20, 1998...Page 13a

TABLE OF APPENDICES

APPENDIX H---ORDER---U.S. DISTRICT COURT DISTRICT OF ARIZONA DATED SEPTEMBER 23, 1998...Page14a

APPENDIX I—OPINION—COURT OF APPEALS STATE OF ARIZONA DATED MARCH 23, 1999.....Page 15a

APPENDIX J-ORDER-SUPREME COURT OF THE STATE OF ARIZONA DATED OCTOBER 26, 1999.....Page 25a

APPENDIX K--EXHIBIT--A-FILED WITH PETITIONER'S PETITION FOR REHEARING------U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT DATED MARCH 13, 2000.....Page 27a

APPENDIX L—RELEVANT STATUTE 42 U.S.C. SECTION 1983.....Page 32a

Carl E. Nicholson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is not reported. The opinion of the district court (Appendix F) was, also, not reported.

STATEMENT OF JURIDICTION

This petition for a writ of certiorari is from the final judgment of the district court. By order entered September 23, 1998, the district court granted defendants' motion to dismiss. The district court had jurisdiction of this action pursuant to 28 U.S.C. section 1331 (federal question jurisdiction) and 28 U.S.C. section 1367 (supplemental jurisdiction). On October 5, 1998, Plaintiff filed a notice of appeal. The appeals court had jurisdiction over the appeal from final judgment of the district court pursuant to 28 U.S.C. section 1291. The appeals court panel entered final judgment on December 27, 1999. The appeals court panel denied Petitioner's request for rehearing and hearing En Banc by its final order issued on March 13, 1999. This Court has jurisdiction over this petition for a writ of certiorari review from final judgment pursuant to 28 U.S.C. section 2101(c).

STATUTORY PROVISION INVOLVED

42 U.S.C. SECTION 1983, The complete text of which is set forth at Appendix L.

STATEMENT OF THE CASE

On December 18, 1997, Petitioner filed an amended complaint naming, Respondents as defendants, due to their, alleged, abuse of processes in a prior state court action.

The amended complaint listed Conspiracy as the first cause of action. Subsections of that cause included various allegations of perjury, subornation of perjury, forgery, and other alleged misdeeds.

Fraud was listed as the second cause of action, and included various facts to support the claim, including multiple statements, allegedly, made by Respondents in an effort to obtain a protective order, along with allegations of other acts, also, done to effectuate the order.

The third cause of action was mislabeled Obstruction of or Interference with Legal Remedy, which should have read "Abuse of Process".

The fourth and final cause of action listed Injurious Falsehood. That claim was filed, based on a belief on Petitioner's part that the multiple, allegedly, false statements filed by respondents were, purposely, designed in an effort to injure Petitioner, and to, improperly, assist Respondents in achieving their ultimate goal of obtaining the protective order, as a prerequisite to having the state court action dismissed.

Petitioner demanded a jury trial.

On February 10, 1998, rather than answering the complaint, Respondents, instead, filed a motion to dismiss the action with prejudice for failure to state a claim under Arizona, or federal law, citing, primarily, *Linder v. Brown & Herrick*, 189 Ariz. 398, 943 P.2d 758 (Ariz. App., 1997), claiming:

"The Amended Complaint fails to state a claim

under Arizona law because all of the alleged misconduct of Defendants is absolutely privileged under Arizona's litigation privilege." (Argument sect. II MOTION TO DISMISS AND SUPPORTING MEMORANDUM, Page 6); and *Schucker v. Rockwood* 846 F.2d 1202, 1204 (9th Cir. 1988), claiming "[C]onclusory allegations that [the judge] conspired with the law firms are insufficient to support his section 1983 claim." "Nicholson's allegations are at best conclusory, and they are bereft of specific facts showing an actual conspiracy involving a meeting of the minds, rather than independent conduct by the parties."(MOTION TO DISMISS AND SUPPORTING MEMORANDUM, Pg. 9.) "Additional allegations in the Amended Complaint concerned purported unilateral conduct by Judge Schafer and this staff, not concerted action." MOTION TO DISMISS AND SUPPORTING MEMORANDUM, Pg. 10.) "Such allegations of unilateral conduct by a judge are not sufficient to sustain a section 1983 conspiracy claim, even if the alleged conduct were in fact improper." (MOTION TO DISMISS AND SUPPORTING MEMORANDUM, Pg. 11.)

In direct response to Respondents' legal argument, Petitioner countered by requesting that the district court deny Respondents' motion based on, clearly, established Arizona law and Arizona Constitutional law, along with federal law. Petitioner reminded the court that:

> **[i]n *Fickett v. Superior Court of Pima County*, 27 Ariz. App. 793, 794-95, 558 P.2d 988, 989-90 (1976), the court opined: "The general rule for many years has been that an attorney could not be liable to one other than his client in an action**

arising out of his professional duties, in the absence of fraud or collusion." 7 Am Jur. 2d. Attys-at-law, section 167. (PLAINTIFF'S RESPONSE IN OPPOSITION TO DISMISSAL, Page 4.); and that the Arizona Court in *Lewis v. Swenson*, 126 Ariz. App., 561, stated; "But we are of the opinion that the better view is that the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors; among which are the extent to which the transaction was intended to affect Plaintiff; the foreseeability of harm to him; the degree of certainty that the Plaintiff suffered injury; the closeness of the connection between the defendants' conduct and the injuries suffered; the moral blame attached to the defendants' conduct; and the policy of preventing future harm." (PLAINTIFF'S RESPONSE IN OPPOSITION TO DISMISSAL, pg. 5).

Petitioner cited federal law in *Robinson v. Volkswagenwerk A.G.*, 940 F.2d 1369 (10th Cir. 1991), where the district court rejected the theory of absolute immunity, stating that:

> **"[a]ny immunity that might attach to private attorney's conduct does not attach to the conduct alleged in this case to be fraudulent." (V.R. doc. 199 at 4.) Our review of the district court's legal determination on absolute immunity is de novo. See, *Snell*, 920 F.2d at 694. "Given the sparing recognition of absolute immunity by both the Supreme Court and this Court, one claiming such immunity must demonstrate clear entitlement." See, *Burns v. Reed* –U.S.-, 111 S. Ct. 1934, 1944-45, 114 L. Ed 547 (1991). See, also, *Tower v. Glover*, 467 U.S. 914, 922-23, 104 S. Ct.**

2820, 2825-26, 81 L.Ed. 2d 758 (1984); Concerning suits by litigants other than an attorney's own client, the general rule is that: If an attorney is actuated by malicious motives or shares the illegal motives of his client, he may be personally liable with the client for damage suffered by a third person as a result of the attorney's actions. In *Robinson*, id., Plaintiff and G&G sought to hold H&R liable based upon allegedly fraudulent statements made in the course of discovery and at trial, and the court could not identify a common law precedent for absolute immunity on such claims. The claims asserted were not for defamation and H&R could not avail itself of the immunity afforded government lawyers responsible for vindicating the public interest. The court concluded that H&R was not entitled to absolute immunity for the discovery and litigation statements contained in the Plaintiffs' second amended complaint. While deprivation of constitutional right is essential to proceed under section 1983 conspiracy claim, proof of agreement to deprive often will require examination of conduct occurring prior to deprivation. The facts alleging a conspiracy between the defendants and the state actors are not conclusory, but can be proven by a preponderance of evidence, already presented, and yet to be presented."[p]eople that engage in such agreements may not voluntarily proclaim to others their purpose, therefore a jury, may draw on circumstantial evidence to determine whether or not a conspiracy did exist.

It is sufficient if the proven facts convince a jury that the parties were acting together understandably, in order to accomplish a purpose which in itself was unlawful, or a method that was

contrary to law. A jury may establish a conspiracy by inference from the nature of the acts complained of; the individual and collective interest of the alleged conspirators; the situation and relation of the parties at the time of the commission of the acts; the motives which produced them, and all the surrounding circumstances preceding and attending the culmination of the common plan or design." (PLAINTIFF'S RESPONSE IN OPPOSITION TO DISMISSAL, Pgs. 6-8.)"

Petitioner, also, asked the court to deny Respondents' motion, and enter a default judgment "based on the undeniable fact that they, along with counsel, are continuing to perpetrate fraud upon the tribunal, as they did in the lower court." (PLAINTIFF'S RESPONSE IN OPPOSITION TO DISMISSAL, Pg. 1.)

That statement was presented as a direct result of, then, counsel's, (Chris A. LaVoy's) fraudulent filing of forged documents, which were never introduced or filed in the state court action. The documents LaVoy introduced as true and correct copies were, in fact, forged documents, which contained a date and mailing certificate where the original documents filed in the state action were filed, and remained, undated, and without a mailing certificate, throughout the state court action. That fact was confirmed by Michael K. Jeanes, Clerk of the Maricopa County Superior Court, where the state court action was originally filed. (PLAINTIFF'S RESPONSE IN OPPOSITION TO DISMISSAL, Pg. 2.)

Immediately, after Petitioner informed the district court of the Respondents' filing of the forged documents, Bennett Evan Cooper, special counsel in the law firm of Respondent, Steptoe & Johnson, counsel to defendants in this action, filed a declaration, on March 5, 1998, which, in effect, sought to withdraw two of the forged documents

from the record and replace them with two of the true and correct copies of the documents filed with the state court. Also, filed with the declaration was a copy of, Respondent, Robinson's, allegedly, perjured affidavit filed in the original state court action. (DECLARATION OF BENNETT EVAN COOPER IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, Pg. 1.)

The only explanation for the insertion and filing of Respondents' forged documents into the official district court record was offered by Bennett Evan Cooper in his filing of DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS, on page 4, wherein, he claimed:

> **"In addition, Nicholson attempts to camouflage the insufficiency of his Amended Complaint and evidence with continuing accusations of forgery and fraud by defendants' present counsel in submitting Exhibit 6 to the LaVoy Declaration; Resp. at 1-3. The LaVoy Declaration inadvertently attached a second service copy of the motion papers rather than the actual copy filed with the court. The only difference is that the proof of service was completed on the second service copy. The difference is immaterial, and Nicholson's inflammatory accusations are meritless." (DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS, Pg. 4.)**

The record reveals that the forged documents and the alleged true and correct copies differed in several ways.

First, the forged documents were allegedly back dated to conform with Respondents' previously filed pleadings. In fact, the alleged true and correct copies contained no date, whatsoever.

Second, the forged documents contained a mailing

certificate, while the alleged true and correct copies did not.

And, third, the forged documents filed in the district court action were never filed in the state court action.

Petitioner argued that:

"Fed. R. Evid. 1001 defines a duplicate or copy as a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original. (Pub.L 93-595, section 1, Jan. 2, 1975, 88 Stat. 1945.) Fed. R. of Evid. 1002, REQUIREMENTS OF ORIGINAL reads: To prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress. (Pub. L. 93-595, section 1, Jan. 2, 1975, 88 Stat. 1946). Very purpose of rules requiring production of original writings or excuses for their non-production is to secure most reliable information as to contents of documents when terms are disputed. *Robertson v. M/S Sanyo Maru*, C.A. La. 1967, 374 F. 2d 463, on remand, 198 F. Supp. 931. Wherever practicable, original document should be used, but rigidity of original writing rule should be relaxed where original is necessary for an equally important judicial purpose, but is available for comparison if improprieties are suspected. *Cooper v. State*, 1979, 397 A. 2d 245, 41 Md. App. 392. Best evidence rule, "codified and expanded to cover recordings and photographs, requires only that a party seeking to prove the contents of a document introduce the original

document or explain why it cannot be produced. *U.S. v. Rose*, C.A. Ill. 1978, 590 F. 2d 232, certiorari denied 99 S. Ct. 2854, 442 U.S. 929, 61 L. Ed. 2d 297. Under the "original document rule" original writing must be produced if available. *Shields v. Folsom*, D.C. Pa. 1957, 153 F. Supp. 733. An objection by the party against whom secondary evidence is offered is necessary to bring the best evidence rule into operation. *U.S. v. Alexander*, C.A.(S.C.) 1964, 326 F. 2d 736. Fed. R. of Evid. Rule 1003 states that a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or, (2) under the circumstances it would be unfair to admit the duplicate in lieu of the original (Pub. L. 93-595, section 1, Jan. 2, 1975, 88 Stat. 1946.) The committee on the Judiciary approved this rule with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original." Defendants failure to produce certified copies of the original documents, they listed as true and correct copies, is evidence of a conspiracy to obstruct justice and evidence of fraud upon a tribunal. Fed. R. Civ. P. 56(g) authorizes the court to take appropriate steps and to sanction those that attempt fraud upon the tribunal. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any

offending party or attorney may be adjudged guilty of contempt. (As amended Aug. 1, 1987.) Federal Rule 60 (b) (3), regarding...fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation or other misconduct of an adverse party: This amendment makes fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. This expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. (See *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, (1944), 64 S. Ct. 997, 322 U.S. 238 88 L. Ed. 1250) For a finding of fraud on the court, Plaintiff has to show that a scheme existed to interfere with judicial machinery performing task of impartial adjudication, as by preventing opposing counsel from fairly presenting his case. A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as, "fabrication of evidence". Fraud consist of conduct so egregious that it undermines the integrity of the judicial process." (PLAINTIFF'S SUPPLEMENTAL RESPONSE AND INTRODUCTION OF NON DOCUMENTARY EVIDENCE, Pgs. 2-4)

Under Arizona Revised Statutes; section 13-2001 (3), classifies:

"Forged instrument" means a written instrument which has been falsely made, completed or altered.

A.R.S. section 13-2001(4) defines "Incomplete written instrument" as a written instrument which contains some matter by way of content or authentication but which requires additional matter to render it a

complete written instrument.

A.R.S. section 13-2001(6) reads: To falsely alter a "written instrument" means to change, without the permission of anyone entitled to grant it, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter or in any other manner, so that the altered instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

A.R.S. section 13-2001(7) reads: "To falsely complete a written instrument" means to transform an incomplete written instrument into a complete one by adding, inserting or changing matter without the permission of anyone entitled to grant it, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

A.R.S. section 13-2001(9)(a)(b) defines "written instrument" as (a) Any paper, document or other instrument containing written or printed matter or its equivalent; or (b) Any token, stamp, seal, badge, trademark or other evidence or symbol of value, right, privilege or identification.

A.R.S. section 13-2002(a) classifies Forgery as: A person commits forgery if, with intent to defraud, such person: (1) Falsely makes, completes or alters a written instrument; or (2) Knowingly possesses a forged instrument; or (3) Offers or presents, whether accepted or not, a forged instrument or one which contains false information. Forgery is a class 4 felony.

On March 12, 1998, Petitioner introduced an audio tape, from which transcripts had already been introduced and attached as exhibits to the Amended Complaint to support his claim.

On June 3, 1998, Petitioner filed a notice of service

of interrogatories, after being informed on May 12, 1998 by a judicial assistant for the district court that discovery could proceed. (PLAINTIFF'S SURREBUTTER AND ACCOMPANYING AFFIDAVIT)

On July 2, 1998, Respondents' counsel filed DEFENDANTS' MOTION FOR STAY OF DISCOVERY AND SUPPORTING MEMORANDUM.

Respondents' argument for a stay of discovery centered around their misapprehension of the Arizona appeals court ruling in *Linder v. Brown & Herrick*, 189 Ariz. 398, 943 P. 2d 758 (1997).

In direct response to Respondents' stay motion, Petitioner cited state and federal law, along with the Arizona Constitution which provides:

> **"The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation. (Ariz. Constitution, Art. 18 section 6.) On an equal protection challenge affecting fundamental rights, the court must apply a "strict scrutiny" test. See *Kenyon v. Hammer*, 142 Ariz. 69 78-79, 688 P.2d 961, 970-971, (1984). Federal court must apply law of state's highest court; however, if that court has not spoken, federal court must ascertain from all available data what state law is and apply it, and if state appellate court announces principle and relies upon it, that is a datum not to be disregarded by federal court unless it is convinced by other persuasive data that highest court would decide otherwise. *Northland Ins. Co. v. Guardsman Products, Inc.*, 141 F. 3d 612. (PLAINTIFF'S RESPONSE IN OPPOSITION TO STAY OF DISCOVERY, Pg. 5.) "In reference to Summary Judgment & Discovery, the courts have ruled: Summary Judgment should be**

refused where nonmoving party has not had opportunity to discover information that is essential to its opposition. *Burnside - Ott Aviation Training Center, Inc. v. U.S.*, (C.A., Fed. 1993), 985 F. 2d 1574. Court generally should not render summary judgment prior to completion of discovery. *Tenebaum v. Williams*, E.D.N.Y. (1994), 862 F. Supp. 962, adhered to on denial of reconsideration, 907 F. Supp. 606. Plaintiff was entitled to discovery before dispositive ruling on defendant's motion for summary judgment, where Plaintiff complied with rules of procedure by certifying her need for opportunity to complete discovery. *Kachmar v. SunGard DATA Systems, Inc.*, C.A. 3 (PA.) 1997, 109 F. 3d 173. Since summary judgment is drastic-device it should not be granted where there are major factual contentions in dispute, particularly when one party has yet to exercise its opportunities for pretrial discovery. *National Life Ins. Co. v. Solomon*, (C.A.) N.Y. (1975), 529 F.2d 59. Accelerated summary judgment procedure must await reasonable opportunity for Plaintiffs to complete discovery on issues material to determination of motion for summary judgment. *Buchholtz v. Swift & Co.*, D.C. (MINN) (1973). Summary judgment may not be granted if the non-moving party has had an inadequate time to conduct discovery. *U.S. v. Bliss*, E.D. (MO) (1987), 667 F. Supp. 1298. District court erred in granting defendants motion for summary judgment while Plaintiff's interrogatories remained unanswered. *Sames v. Gable*, C.A. (PA) (1984) 732 F. 2d 49. Courts should allow party time for discovery under Federal Rule 56 (f), where party has not had prior opportunity to conduct discovery, *U.S. on Behalf and for Benefit of Army Athletic Ass'n v.*

Reliance Ins. Co., C.A. 9 (CAL) (1986) 799 F.2d 1382. Non-movant for summary judgment must be allowed adequate time for discovery. *Federal Deposit Ins. Corp. v. Fisher*, D. (MINN) (1989) 727 F. Supp. 1306.(PLAINTIFF'S RESPONSE at Pgs. 7-8) [c]omplaint need not specify correct legal theory or point to right statute to survive motion to dismiss for failure to state a claim *Pope v. Inland Property Management Inc.*, N.D. ILL (1995), 878 F. Supp. 1114, also see, *MSA Realty Corp. v. State of Ill.* (1992) 794 F.2d Supp. 267, affirmed 990 F.2d 288. Generally, fact that complaint does not cite relevant statutory provision does not require dismissal; as long as complaint contains set of facts for which relief may be granted; it survives motion to dismiss for failure to state a claim. *Thomas v. New York City*, E.D. (N.Y.) (1983), 814 F. Supp. 1139. In light of the liberal pleading standards, Plaintiff's pro se complaint provided fair notice to defendant of nature and basis of the asserted claims and general indication of the type of litigation involved so as to survive motion to dismiss for failure to state a claim upon which relief can be granted. *Brown v. Peoples Sec. Ins.*, E.D. (PA) (1994), 158 F.R.D. 350." (PLAINTIFF'S RESPONSE IN OPPOSITION, Pg. 2)

On September 3, 1998, the district court granted Respondents' motion for stay of discovery and refused, without explanation, to sanction Respondents, or their counsel, for their previously alleged litigation abuses in the district court action.

On Monday, September 14, 1998, Petitioner filed a notice of intent to file a criminal referral with the U.S. Department of Justice due to the alleged illegal activities of Respondents during the district court action.

On Sunday, September 20, 1998, less than

one week after the above notice was filed, and without a hearing, the district court judge signed an order granting Respondents' motion to dismiss action with prejudice for failure to state a claim under Arizona or federal law. The judge's opinion stated:

> **"Dismissal for failure to state a claim pursuant to Rule 12 (b)(6) is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Cervantes v. City of San Diego, 5 F. 3d 1273 (9th Cir. 1993), quoting Hishon v. King & Spaulding, 104 S. Ct. 2229, 2232 (1984). (District Court Order, Pg. 2). Defendants argue that Plaintiff's state law claims for "fraud", "injurious falsehood", and "interference with legal remedy" must be dismissed because they all arise out of litigation conduct and such claims cannot be brought because of Arizona's litigation privilege. (Order, Pgs. 5-6.) "The defense is absolute in that the speaker's motive, purpose or reasonableness in uttering a false statement do not affect the defense." *Linder v. Brown & Herrick*, 943 P. 2d 758 (Az Ct. App. 1997); *Green Acres Trust v. London*, 688 P. 2d 617, 620-24 (Ariz. 1984). Plaintiff's tort claims are properly dismissed based on plaintiff's allegations because of the litigation privilege. The Court will permit amendment if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in a complaint that plaintiff might plead. Here, Plaintiff cannot make any specific allegation that defendants engaged in a conspiracy with state officials sufficient to state a cognizable claim. Plaintiff's section 1983 action lacks an arguable basis in either law or fact. See *Karim-Panahi*, 839 F. 2d at 624; *Ivey*, 673 F. 2d at 268. Because Plaintiff cannot assert a federal**

claim which would act as the basis for federal court jurisdiction, amendment of Plaintiff's state law claims is futile in federal court. Moreover, because of the litigation privilege, Plaintiff cannot assert cognizable state law claims based on the facts asserted in his amended complaint. Therefore, the court will not permit further amendment of Plaintiff's complaint (Order, Sunday, September 20, 1998, pgs. 5-7).

The district court refused to consider, or make any ruling pertaining to the audio tape, which was, timely, introduced on March 12, 1998, or the transcript of that tape, or other transcripts of other audio tapes appended to the amended complaint, which tended to prove, beyond doubt, the conspiracy allegations in the amended complaint were not conclusory, and that the Respondents had, also, abused legal processes.

On October 5, 1998, Petitioner filed a notice of appeal from the district court judgment.

On October 7, 1998, the district court record, along with the audio tape evidence, were transmitted to the Court of Appeals for the Ninth Circuit.

On December 8, 1998, Petitioner filed his "OPENING BRIEF". In that brief Petitioner presented the following issues for review:

> **"A dismissal for failure to state a claim is subject to de novo review and is proper only if it appears beyond doubt that the Plaintiff would be entitled to no relief under any state of facts that could be proved. Did the district court err when it dismissed Plaintiff's action?"**
>
> **"The Ninth Circuit Court of Appeals has ruled numerous times, making this issue well-settled, that before dismissing a pro se civil rights**

complaint for failure to state a claim, district court must give plaintiff a statement of complaint's deficiencies. Did the court err when it failed to identify any particular enumerated deficiencies in the complaint, prior to dismissal, and in denying Plaintiff an opportunity to amend, and by improperly dismissing complaint with prejudice?"

"On Sunday, September 20, 1998, the district court ruled that plaintiff failed to allege a conspiracy involving the defendants, or a meeting of the minds with the state actors. Were Plaintiff's pleadings, audio taped evidence, and other proof sufficient to state a section 1983 cause of action without an amendment?"

"On September 24, 1997, defendants David J. Bodney and Steptoe and Johnson LLP filed a petition for a writ of mandamus to the United States District Court for the District of Arizona, (Roger G. Strand, District Judge, Presiding), on behalf of Petitioners, Phoenix Newspapers, Inc. and KPNX Broadcasting, alleging, among other things, serious constitutional, and possible ethical violations by Judge Strand. Did defendants' filing of the writ, including its contents, present enough of a conflict of interest to require the sua sponte recusal of Judge Strand in the case at bar?

On January 21, 1999, Respondents filed their "BRIEF OF THE APPELLEES". In that brief Respondents presented the following issues for review:

"Did the district court correctly dismiss Appellant's fraud and "injurious falsehood" claims where the claims were based on alleged

misconduct by opposing parties and their counsel in a prior litigation, and conduct in litigation is absolutely privileged under Arizona law?"

"Did the district court correctly dismiss Appellant's claim under 42 U.S.C. section 1983

against his opponents and their counsel in a prior state court action where the claim was based only on conclusory allegations of conspiracy between those private parties, the state court judge, and the judge's staff, and Appellant failed to make specific allegations of fact from which a conspiracy could be reasonably inferred?"

"Should the district court judge have disqualified himself for bias on his own initiative where the only alleged source of bias was that he had ruled against clients of the defendant lawyers in an unrelated case and had been reversed on a petition for writ of mandamus to the court of appeals?"

While Respondents agreed with Petitioner that Petitioner had failed to misstate or misrepresent decisions of law; Respondents, on the other hand, had, on (3) separate occasions in their brief, misstated the unanimous Ninth Circuit court ruling in *Phoenix Newspapers, Inc. v. United States District Court*, 156 F. 3d 940, (9th Cir. September 14, 1998.) (BRIEF OF THE APPELLEES, Pgs 2, 10, 33.)

Respondents claimed in their brief that the Ninth Circuit Court of Appeals had: "reversed" the district court Judge "on a petition for writ of mandamus." (Pg. 2) "That certain of the lawyer appellees represented unrelated clients in a "successful" petition for writ of

mandamus to this court, which resulted in an published decision "reversing" the district court below...." (Pg. 10.) "The Ninth Circuit "granted" the petition for mandamus in a published opinion issued prior to Judge Strand's ruling in this case. *Phoenix Newspapers Inc. v. United States District Court*, 156 F. 3d 940 (9th Cir. Sept. 14, 1998)." (Pg. 33.)

Along with the intentional misstatements of law, above, Respondents allegedly made, at least, 87 (eighty-seven) additional statements which misstated the facts of the case and of Arizona law. Petitioner was forced to use all but six pages of his "REPLY BRIEF" in an attempt to correct the factual errors proffered by Respondents.

Respondents' "BRIEF OF THE APPELLEES", among other things, continued to assert that :

> **"The district court correctly held that the Amended Complaint failed to state a claim under Arizona law because all the alleged misconduct of Appellees is absolutely privileged under Arizona's litigation privilege." (BRIEF OF THE APPELLEES, Pg. 11); "In addition, the Arizona Court of Appeals has recently recognized that the litigation privilege bars fraud claims against the adverse party or its counsel arising out of litigation conduct". *Linder v. Brown & Herrick*, 189 Ariz. 398, 943 P. 2d 758 (Ct. App. 1997), review denied (Ariz. Sept. 16, 1997). (BRIEF OF THE APPELLEES, Pgs.12-13); "...[t]hey invoked clear Arizona law which rejects causes of action in tort for litigation conduct by an opposing party." (BRIEF OF THE APPELLEES, Pg. 14.)**

Respondents' brief, also, alleged, without any reference to the audio tapes or transcripts offered by Petitioner and attached to the Amended Complaint, that "Nicholson's Accusations of Dishonest Conduct Are

Meritless." (B. of A., at Pg. 14); "Nicholson's Allegations of Conspiracy are Impermissibly Conclusory." (B. of A., at Pg. 18); Nicholson's allegations are at best conclusory, and they are bereft of specific facts showing an actual conspiracy involving a meeting of the minds, rather than independent conduct by the parties." (B. of A., at Page 19); "This is not a case of a technical defect or of material factual allegations being omitted, Nicholson appended all of his "evidence" in opposition to Appellees' motion to dismiss. Even if one considers all of this material, none of it shows any hint of a conspiracy between Appellees and Judge Schafer or his staff. Indeed, even now Nicholson relies on allegations of unilateral actions by the defendants without any showing of any specific acts of conspiratorial conduct by any state actors." (B. of A., at Pgs. 31-32.)

Respondents failed to explain why they believed the district court refused to consider the audio tape or the transcript "evidence" which was appended to the Amended Complaint, or why the issues of their claimed "unilateral" conduct, as opposed to Petitioner's allegations of "conspiratorial" conduct, were not left to a jury to decide.

On February 9, 1999, Petitioner filed his "REPLY BRIEF". In the brief, petitioner asked the court to strike the "BRIEF OF THE APPELLEES" because it contained, at least, (90) grossly inaccurate or false statements. Petitioner attempted to correct, clarify, and add additional facts to the record so that it would better reflect the true evidence, omitted by Respondents' brief, while, at the same time, adhering to page limit requirements.

Petitioner, also, pointed out to the appeals court that the district court may have erred when it failed to consider the tangible evidence of the audio tapes and transcripts which were, clearly, admissible pursuant to Fed. R. of Evid. Rules 902, 402, and 403; and such

evidence, also, proved that the conspiracy allegations found in the Amended Complaint were, by no means, conclusory. (APPELLANT'S REPLY BRIEF, Pg. 15). Petitioner cited the following cases:

> **"Use of tape recordings is acceptable as long as a proper foundation has been laid. *U.S. v. Onori*, C.A. Fla. (1976), 535 F. 2d 938; Recordings of conversations constitute real, as opposed to testimonial evidence. *Id.*; The foundation which must be laid for introduction of recordings of conversations, its nature and extent, rest largely within the judicial discretion of the trial judge. *Brandow v. U.S.*, C.A. Cal. (1959), F.2d 559. Particularly in light of testimony relating to substance, crucial portions of recorded conversation, voices on tape were sufficiently identified at trial to prevent confusion by the jury, and tape of conversation was admissible. *U.S. v. McCauley*, C.A. Mo. (1974), 601 F.2d 336; Telephone conversation is admissible provided that the identity of the speaker is satisfactorily established. *U.S. v. Biondo*, C.A. Mo. (1973), 483 F.2d 635, certiorari denied, 94 S.Ct. 1468, 415 U.S. 947, 39 L.Ed. 2d 563; Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony. *Nixon v. Sirica*, (1973), 487 F.2d 700, 159 U.S. App. D.C. 58, 19 A.L.R. Fed. 343; Telephone conversations, the substance of which are relevant and material to issues, are competent evidence provided person with whom conversation was had is established by direct evidence or facts and circumstances. *People v. Nichols*, 38 N.E. 2d 766, 378 Ill. 487, (1941)." (APPELLANT'S REPLY BRIEF, Pgs. 15-16).**

Petitioner, also, suggested that the appeals court

consider the possibility that the district court may have erred by failing to consider or rule on the real evidence of the audio tape and transcript evidence when he presented the following cases for:

> **District Court is Mute on Audio Tape Evidence Making Ruling Unclear. Trial judge does not have right to prevent evidence from getting to jury merely because he does not think it deserves to be given much weight...[b]ut he may not screen witnesses simply to decide whether their testimony is persuasive. *Western Industries, Inc. v. Newcor Canada Ltd.*, C.A. Wis. (1984), 739 F.2d 1198; Fact that evidence is damaging or prejudicial to defendant's case does not necessarily mean the evidence should be excluded. *U.S. v. Terzado-Madruga*, C.A. 11 Ga. (1990), 897 F.2d 1099, rehearing denied; District court was required to fully articulate reasons for excluding evidence. *U.S. v. Restrepo*, C.A. 5 Tex. (1992), 966 F.2d 964, certiarari denied, 113 S.Ct. 968, 506 U.S. 1049, 122 L.Ed. 2d 124. (APPELLANT'S REPLY BRIEF, Pg. 16.)**

On March 17, 1999, Petitioner filed his "STATEMENT IN SUPPORT OF ORAL ARGUMENT".

On June 2, 1999, Petitioner filed an "Emergency Motion" Under Circuit Rule 27-3. The motion sought sanctions pursuant to Fed. R. Civ. P. Rule 11; F.R.A.P Rule 46; F.R.A.P. Rule 26.1; F.R.A.P. Rule 28; and 28 U.S.C. section 1927. The sanctions requested were to: Strike the Brief Of The Appellees; Disqualify Opposing Counsel, Disciplinary Action; Order Of Default; and Sanctions Pursuant to 28 U.S.C section 1927. (Emergency Motion, Pages 1-53).

On December 27, 1999, the appeals court panel issued an order affirming the district court. The appeals

court relied on *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996), which stated:

> **"[p]laintiff who alleged an extrajudicial agreement between attorneys and a judge stated a section 1983 claim against private defendants." And," To the extent that Nicholson appeals the dismissal of his state tort law claims, we agree with the district court that the defendants' conduct was privileged under Arizona law. See, *Linder v. Brown & Herrick*, 943 P.2d 758, 765-766 (Ariz. Ct. App. 1997). "We conclude that the district court properly dismissed the amended complaint without leave to further amend because "it is clear, upon de novo review, that the complaint could not be saved by any amendment." (Please see complete appeals court ruling in Appendix.)**

On January 13, 2000, Petitioner filed a "PETITION FOR REHEARING" and "PETITION FOR HEARING EN BANC". Petitioner cited a new case captioned, *Giles v. Hill Lewis Marce*, 988 P.2d 14 (Ariz. App. 1999), review denied, (Ariz. Sup. Ct., October 26, 1999). That new case, virtually, threw out *Linder* and expressly confirmed the already recognized, and, always, available cause of action, under Arizona tort law, "Abuse of Process".

On January 31, 2000, Petitioner filed, "PETITIONER'S MOTION TO RECALL MANDATE".

On February 10, 2000, Respondents filed, "APPELLEES' RESPONSE IN OPPOSITION TO APPELLANT'S MOTION TO RECALL MANDATE".

On February 18, 2000, Petitioner filed, "PETITIONER'S RESPONSE IN SUPPORT OF MOTION TO RECALL MANDATE".

On March 13, 2000, the appellate court issued an

order denying Petitioner's motion to recall mandate "[b]ecause he has not shown good cause or exceptional circumstances that would justify the recall."

REASONS FOR GRANTING THE WRIT

1. The Petition Should Be Granted Because The Opinion Below Conflicts With Decisions Of This Court And Those Of All Twelve Circuits On A Matter Of Nationwide Importance To All Pro Se Litigants Unable To Afford Legal Counsel And Also Of Great Significance To All Victims Of Civil Rights Violations Filing Claims Under 42 U.S.C. Section 1983. The Writ Should Also Be Granted Because The Opinion Was Decided In A Way That Conflicts With Multiple Decisions Of The Supreme Court Of The State Of Arizona.

The district court dismissed Petitioner's state law claims based on the state appeals court ruling in *Linder v. Brown and Herrick*, 943 P.2d 758 (Ariz. App. 1997). However, in a new ruling the Arizona Apeals Court in, *Giles v. Hill Lewis Marce*, 988 P.2d 147, clarified the so-called "litigation privilege" entitlement, claimed by Respondents. (Please see Appendix for complete *Giles* ruling.)

The Court of Appeals for the Ninth Circuit affirmed the district court ruling, which suggests the district court, along with the appellate court, misapplied Arizona law to the facts; and may have erred in their interpretation of Arizona law, pertaining to Respondents' claims to an "absolute litigation immunity" defense.

The appeals court, also, cited *Kimes v. Stone*, 84 F.3d 1121, 1126, (9th Cir. 1996), to affirm the district court opinion. However, in *Kimes,* plaintiffs did not include transcripts, or audio tape evidence to support their conspiracy claim, and yet it survived a motion to dismiss for failure to state a claim.

Petitioner believes the district court, along with the appellate court may have, clearly, erred when they refused to consider the evidentiary facts and other

materials attached as exhibits to supplement Petitioner's amended complaint. (Examples, audio tape and multiple transcripts.)

Petitioner, also, believes the appeals court may have erred when they failed to consider Petitioner's Emergency Motion for Sanctions, and again, when they refused to allow each member of the court to decide whether the full court would consider an En banc hearing, in light of the new ruling in *Giles*.

Petitioner, therefore, respectfully, request that this court grant certiorari review in this matter.

By Carl E Nicholson

Carl E. Nicholson, Petitioner-Pro se
3601 West Bluefield Avenue
Glendale, Arizona 85308-2411
(602) 843-6598

APPENDIX

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED December 27, 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No.98-16936

D.C. No. CV-97-02543-RGS

MEMORANDUM[1]

CARL E. NICHOLSON, dba ServMart,
Plaintiff-Appellant,

v.

DAVID J. BODNEY; PETER B. SWANN; PATRICIA ROBINSON; STEPTOE & JOHNSON; BAKER & HOSTETTLER; DAVID M. GILES; BRUCE W. SANFORD; GLEN A. SMITH; KATHRYN E. UNDERWOOD; SCRIPPS HOWARD BROADCASTING CORPORATION; KNXV-TV; CHRIS HEINBAUGH; SUSAN SULLIVAN; JEFF KLOTZMAN; MICHAEL KRONLEY; BRAD NILSEN,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, District Judge, Presiding

Submitted November 18, 1999[2]

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3

[2]Because we decide unanimously that this case is suitable for decision without oral argument, we deny Nicholson's request for oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: WRIGHT, WALLACE, and SKOPIL, Circuit Judges.

Carl E. Nicholson appeals pro se the district court's dismissal of his civil rights action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We have jurisdiction under 28 U.S.C. section 1291. We review de novo, *see TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir. 1999), and we affirm.

Nicholson's contention that the district court erred by dismissing his 42 U.S.C. section 1983 claim lacks merit because he did not allege facts demonstrating that the defendants acted under color of state law. *See Schucker v. Rockwood,* 846 F.2d 1202, 1205 (9th Cir. 1988) (per curiam) (conclusory allegations that a judge conspired with law firms are insufficient to support section 1983 claim); *cf. Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (plaintiff who alleged an extrajudicial agreement between attorneys and a judge stated section 1983 claim against private defendants).

To the extent that Nicholson appeals the dismissal of his state tort law claims, we agree with the district court that the defendants' conduct was privileged under Arizona law. *See Linder v. Brown & Herrick,* 943 P.2d 758, 765-66 (Ariz. Ct. App. 1997).

We conclude that the district court properly dismissed the amended complaint without leave to further amend because "it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1996).

We reject Nicholson's unsupported contention, raised for the first time on appeal, that the district judge should have recused himself because he was predisposed

to rule in defendant's favor. Nicholson failed to request that the district judge recuse himself under 28 U.S.C. section 144, and has not shown any exceptional circumstances that would justify our consideration of the issue for the first time on appeal. *See Weiss v. Sheet Metal Workers Local No. 544 Pension Trust,* 719 F.2d 302, 304 (9th Cir. 1983) (per curiam).

We also deny Nicholson's Motion for Sanctions and his Motion to Vacate Clerk's Order.

AFFIRMED.

APPENDIX B—JUDGMENT--UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT *DATED FEBRUARY 8, 2000*

Judgment

UNITED STATES COURTOF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16936
CT/AG#: CV-97-02543-RGS

CARL E. NICHOLSON, dba ServMart
Plaintiff - Appellant

v.

DAVID J. BODNEY; PETER B. SWANN; PATRICIA ROBINSON; STEPTOE & JOHNSON; BAKER & HOSTETLER; DAVID M. GILES; BRUCE W. SANFORD; GLEN A. SMITH; KATHRYN UNDERWOOD; SCRIPPS HOWARD BROADCASTING CORPORATION; KNXV-TV; CHRIS HEINBAUGH; SUSAN SULLIVAN; JEFF KLOTZMAN; MICHAEL KRONLEY; BRAD NILSEN
Defendants – Appellees

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and hereby is affirmed.

Filed and entered DECEMBER 27, 1999

s/ *Marian Foreman*
by Marian Foreman, Deputy Clerk

APPENDIX C—ORDER--UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED MARCH 13, 2000

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 98-16936
D.C. No. CV-97-02543-RGS

ORDER

CARL E. NICHOLSON, dba ServMart,
Plaintiff-Appellant,
v.
DAVID J. BODNEY; PETER B. SWANN; PATRICIA ROBINSON; STEPTOE & JOHNSON; BAKER & HOSTETTLER; DAVID M. GILES; BRUCE W. SANFORD; GLEN A. SMITH; KATHRYN E. UNDERWOOD; SCRIPPS HOWARD BROADCASTING CORPORATION; KNXV-TV; CHRIS HEINBAUGH; SUSAN SULLIVAN; JEFF KLOTZMAN; MICHAEL KRONLEY; BRAD NILSEN,
Defendants-Appellees.

Before: WRIGHT, WALLACE, and SKOPIL, Circuit Judges.

The panel denies Nicholson's motion to recall the mandate because he has not shown good cause or exceptional circumstances that would justify the recall. See Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988). "[T]he recall power may not be used simply as a device for granting late rehearing...." Moran v. McDaniel, 80 F.3d 1261, 1267 (9th Cir. 1996) (quoting Johnson v. Bechtel Assocs., 801 F.2d 412, 416 (D.C. Cir. 1986). The untimely Petition for Hearing or for Rehearing En Banc need not be considered.

APPENDIX D---NOTICE--UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT--OF DEFECTIVE PETITION FOR REHEARING DATED JANUARY 24, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 SEVENTH STREET, P.O. BOX 193939
SAN FRANCISCO, CA. 94119-3939
JANUARY 24, 2000

TO: Appellant in Pro Se

COPIES: Bennett Cooper
George Brandon

FROM: Cathy A. Catterson, Clerk
By: Marian Foreman, Deputy Clerk

SUBJECT: Defective petition for Rehearing

RE: CA No. 98-16936 Nicholson v. Bodney

A petition for rehearing in the referenced case was received on __January 24, 2000___ and could not be filed for the following reason (s):

[ ] The petition was received late. A motion for leave to file it late must be submitted.
[XX] The petition was received late and the mandate has been issued. A motion to recall the mandate must be submitted.
[XX] The petition does not include the proof of service. A proof of service must be submitted.

APPENDIX E—ORDER– UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED SEPTEMBER 7, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 98-16936
DC# CV-97-2543-RGS
Arizona (Phoenix)

ORDER

CARL E. NICHOLSON, dba Servmart,
Plaintiff-Appellant,
v.
DAVID J. BODNEY; et al.,
Defendants-Appellees.

Appellees' motion for leave to file a late opposition to appellant's June 8, 1999 motion for sanctions is granted. The Clerk is directed to file appellees' opposition dated June 16, 1999.

In accordance with this court's General Orders, appellant's June 8, 1999 motion for sanctions, appellees' response thereto, and appellant's reply are referred to the panel assigned to decide the merits of this appeal. *See* U.S. Court of Appeals, for the Ninth Circuit General Orders, App. A(35).

For the Court

s/ *Jeff Topor*
Jeff Topor
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

APPENDIX F—ORDER-UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED SEPTEMBER 20, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 97-2543-PHX-RGS

ORDER

CARL E. NICHOLSON dba ServMart,
Plaintiff,
vs.

DAVID J. BODNEY, ET AL.,
Defendants.

Plaintiff's Amended complaint is based upon an underlying dismissal of plaintiff's state court action as a sanction for failure to comply with a court order directing plaintiff to serve a disclosure statement under rule 26.1, Arizona Rules of Civil Procedure. In the present case, plaintiff, appearing pro se, alleges in a lengthy and rambling Amended Complaint that defendants conspired to have plaintiff's state law action dismissed by filing false documents with the court, by having the case reassigned to a judge known to engage in "case fixing", and by committing "injurious falsehood." Plaintiff also appears to be attempting to assert a claim under 42 U.S.C. section 1983 by "alleging judicial deception, by the specific affirmative showing of dishonesty by defendants and that, but for defendants' dishonesty, challenged judicial action would not have occurred [sic]." Response at 7. Defendants move to

dismiss with prejudice plaintiff's Amended Complaint for failure to comply with Rule 8 (a) and for failure to state a claim pursuant to Rule 12 (b)(6), Federal Rules of Civil Procedure.

Failure to State a Claim[1]

"[D]ismissal for failure to state a claim pursuant to Rule 12(b)(6) is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Cervantes v. City of San Diego, 5 F.3d 1273 (9th Cir. 1993) (quoting Hishon v. King & Spaulding, 104 S.Ct. 2229, 2232 (1984). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* Civil rights complaints are to be liberally construed. Gobel v. Maricopa County, 867 F.2d 1201, 1203 (9th Cir. 1989). However, "a liberal interpretation of a (pro se) civil rights compiaint may not supply essential elements of the claim that were not initially pled. Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Ivey v. Board of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

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[1]Defendants first argue that the Amended Complaint should be dismissed for plaintiff's failure to comply with Rule 8(a), Federal Rules of Civil Procedure, which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." As defendants properly note, the Ninth Circuit has approved of dismissal under similar situations. See Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985); Nevijel v. North Coast Life Ins. Co., 651 F. 2d 671, 675 (9th Cir. 1981) (describing pleadings as being "impossible to designate the cause or causes of action attempted to be alleged in the complaint" and as "confusing, distracting, ambiguous, and unintelligible proceedings"). Here, plaintiff's Amended Complaint fails to comply with Rule 8 (a); however, because the Court determines that the action should be dismissed on the merits, the Court will not dismiss the action on Rule 8 (a) grounds.

1. Plaintiff's Section 1983 Claim

Although plaintiff's Amended Complaint does not allege a civil rights violation pursuant to 42 U.S.C. section 1983 on its face, the Court will accept plaintiff's assertion in his Response that he is attempting to allege such a claim. To state a section 1983 claim, plaintiff must allege facts showing a person acting under color of state law deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or federal law. Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988) A private person may act under color of state law if he willfully participates in joint action with state officials to deprive others of their constitutional rights. Dennis v. Sparks, 449 U.S. 24, 29 (1980). To prove conspiracy under section 1983, "an agreement or meeting of minds to violate...constitutional rights must be shown." Woodrum v. Woodward County, Okl., 866 F.2d 1121, 1126 (9th Cir. 1989); *see also* Karim-Panahi v. Los Angeles Police Dep't., 839 F.2d 621, 626 (9th Cir. 1988) ("mere allegation of conspiracy without factual specificity is insufficient"). "Invoking state legal procedures[, however,] does not constitute 'joint participation' or 'conspiracy' with state officials sufficient to satisfy section 1983's state action requirement." Schucker v. Rockwood, 846 F.2d 1202, 1205 (9th Cir.) (*per curiam*), cert. *denied*, 488 U.S. 995 (1988).

The Amended Complaint describes plaintiff's belief that he was wronged in state court by dismissal of his state complaint for failure to follow court orders. Plaintiff generally alleges that defendants conspired with Judge Shafer to effectuate dismissal of his action. Such conclusory allegations that the private defendants conspired with Judge Shafer are insufficient to support his section 1983 claim. There must be specific allegations conspiracy, *id.*, and there must be an allegation

concerning violation of a constitutionally secured right. In his Amended Complaint, plaintiff does not allege any specific facts to show that the defendants have conspired to deprive him of any of his constitutional rights. As noted above, "merely resorting to the courts and being on the winning side of the lawsuit does not make a party a co-conspirator or a joint actor with the judge." Dennis v. Sparks, 449 U.S. 24, 28 (1980).

Plaintiff's Amended Complaint lacks an arguable basis in fact or law and further amendment would not create a cognizable federal constitutional claim under section 1983 because the defendants were not acting under color of state law. *See* Ashelman v. Pope, 793 F. 2d 1072, 1075 (9th Cir. 1986) (*en banc*); Schucker v. Rockwood, 846 F.2d 1202, 1205 (9th Cir.) (*per curiam*), *cert. denied*, 488 U.S. 995 (1988) (defendants' action of "invoking state legal procedures does not constitute 'joint participation' or 'conspiracy' with state officials sufficient to satisfy section 1983's state action requirement").

Nor does the Amended Complaint allege specific facts to support the existence of a conspiracy among the defendants. *See* Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989). Finally, plaintiff's allegations, even liberally construed, cannot support a section 1983 action against defendants.

2. Tort Claims

Defendants argue that plaintiff's state law claims for fraud, "injurious falsehood," and "interference with legal remedy," must be dismissed because they all arise out of litigation conduct and such claims cannot be brought because of Arizona's litigation privilege. In the area of absolute privileges one of the most common is that involving the participants in judicial proceedings. The privilege protects judges, parties, lawyers, witnesses

and jurors. The defense is absolute in that the speaker's motive, purpose or reasonableness in uttering a false statement do not affect the defense. Linder v. Brown & Herrick, 943 P.2d 758 (Az. Ct. App. 1997); Green Acres Trust v. London, 688 P.2d 617, 620-24 (Ariz. 1984). Plaintiff's tort claims are properly dismissed based on plaintiff's allegations because of the litigation privilege.

The remaining issue the Court confronts is whether plaintiff should be given leave to amend his pleading again. The Court will permit amendment if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in a complaint that plaintiff might plead. Here, plaintiff cannot make any specific allegation that defendants engaged in a conspiracy with state officials sufficient to state a cognizable claim. Plaintiff's section 1983 action lacks an arguable basis in either law or in fact. *See* Karim-Panahi, 839 F.2d at 624; Ivey, 673 F. 2d at 268. Because plaintiff cannot assert a federal claim which would act as the basis for federal court jurisdiction, amendment of plaintiff's state law claims is futile in federal court. Moreover, because of the litigation privilege, plaintiff cannot assert cognizable state law claims based on the facts asserted in his Amended Complaint. Therefore, the court will not permit further amendment of plaintiff's complaint.

Based on the foregoing,

IT IS ORDERED granting defendants' motion to dismiss with prejudice. [doc. #6].

IT IS FURTHER ORDERED directing the Clerk of the court to enter judgment in accordance with this Order.

DATED this 20th day of September, 1998.

s/ *ROGER G. STRAND*
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

APPENDIX G---JUDGMENT-- UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA-- DATED SEPTEMBER 23, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. CIV-97-2543-PHX-RGS
JUDGEMENT

CARL E. NICHOLSON, dba ServMart,
Plaintiff,
v.
DAVID J. BODNEY, ET AL,
Defendants.

____ Jury Verdict. This action came before the Court for a trial by Jury. The issues have been tried and the jury has rendered its verdict.

__xx__ Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' Motion to Dismiss having been granted, that plaintiff take nothing and the complaint and action are hereby dismissed.

DATED at Phoenix, Arizona, this 23rd day at September, 1998.

RICHARD H. WEARE
Clerk of Court/DCE
s/ *Illegible*
By: Deputy Clerk

APPENDIX H—ORDER--UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED SEPTEMBER 03, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
CIV 97-2543-PHX-RGS
ORDER

CARL E. NICHOLSON dba ServMart,
Plaintiff,

vs.

DAVID J. BODNEY, et al.,
Defendants.

Defendants move to stay discovery pending a determination of their motion to dismiss. The Court notes that a Rule 16 Conference has not been scheduled of held. Although plaintiff objects to a stay of discovery, [1] good cause appears for staying discovery. In the event the action is dismissed, discovery will not be needed. Thus, until a decision is entered with respect to defendants' motion to dismiss and a Rule 16 conference is conducted by the Court, no discovery already served need be answered and no further discovery may be propounded.

Based on the foregoing,
IT IS ORDERED granting defendants' motion for stay of discovery. [doc. #35].
Dated this 31st day of August, 1998.

s/ *Roger G. STRAND*
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

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[1] **Plaintiff does little more than argue the merits of his case in his response. Plaintiff has not demonstrated any legal or factual basis for denying the stay of discovery pending determination of defendants' motion to dismiss.**

APPENDIX I—OPINION--COURT OF APPEALS STATE OF ARIZONA—DATED MARCH 23, 1999

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

2 CA-CV 98-0033
DEPARTMENT B

OPINION

CHARLES M. GILES and SUSAN P. GILES, husband and wife,
Plaintiffs/Appellants,
v.
HILL LEWIS MARCE, a Partnership,
Defendant/Appellee.

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. C310648

Honorable Michael Alfred, Judge

VACATED AND REMANDED

Law Office of S. Jon Trachta
By S. Jon Trachta **Tucson**
Attorney for Plaintiffs/Appellants

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ESPINOSA, Judge.

1. Plaintiffs/appellants Charles M. Giles and Susan P. Giles, husband and wife, appeal from the trial court's order granting a motion for judgment on the pleadings filed by defendant/appellee Hill Lewis Marce (HLM), a law firm, and dismissing their complaint for abuse of process and other claims. The Gileses' claims were based on HLM's alleged conduct during its representation of the opposing party in an action the Gileses had initiated which was ultimately settled. On appeal, they contend Arizona law does not prohibit a cause of action for abuse of process against opposing counsel and that the settlement of the underlying action does not necessarily bar a claim for malicious prosecution absent a determination of whether the settlement was favorable to them. Because we find both contentious correct, we vacate the judgment in favor of HLM and remand the matter for further proceedings.

Standard of Review

2. A motion for judgment on the pleadings pursuant to Rule 12(c), Ariz. R. Civ. P., 16 A.R.S., tests the sufficiency of the complaint, and judgment should be entered for the defendant if the complaint fails to state a claim for relief. *Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 428 P.2d 990 (1967); *In re One Single Family Residence and Real Property Located at 15453 N. Second Ave.*, 185 Ariz. 35, 912 P.2d 39 (App. 1996). In reviewing a judgment on the pleadings we treat the allegations of the complaint as true, but conclusions of law are not admitted *Shannon*.

Facts and Procedural History

3. In February 1993, Charles M. Giles, P.C., filed a breach of contract action in Pima County seeking "to resolve certain differences" it was having with Bell

Atlantic Tricon Leasing. HLM represented Bell Atlantic and moved for a change of venue to Maricopa County. The motion was denied. HLM then filed an answer and counterclaim, and served its disclosure statement. In July, HLM filed a separate complaint on behalf of Bell Atlantic in Maricopa County against Charles M. Giles, P.C., and Charles and Susan Giles in which they made allegations identical to those in the counterclaim filed in the Pima County action. Although HLM was informed that the Gileses had continuously resided in Pima County for thirty years, had no connection to Maricopa County, and would incur additional attorneys' fees there, it refused to consent to a change of venue to Pima County. Consequently, the Gileses moved the Maricopa County superior court for a change of venue. While that motion was pending, HLM moved for summary judgment, notwithstanding the fact that the Gileses had not yet answered the complaint. During this time, HLM continued to send pleadings to the Gileses' home, even though it knew they had retained Phoenix counsel. After discovery had begun and the Gileses had incurred attorneys' fees and costs in excess of $9,000 in connection with the Maricopa County action, the trial court granted their motion to change the venue of that action to Pima County. In the Pima County action, HLM failed to disclose certain documents, made incomplete and inadequate disclosure, and withheld information that contradicted Bell Atlantic's position in that litigation. The two cases were consolidated and the parties later settled.

4. The Gileses filed a complaint against HLM, alleging claims of abuse of process, violation of the Rules of Professional Conduct, Ariz. R. Sup. Ct. 42, 17A A.R.S., violation of Rule 11, Ariz. R. Civ. P., and intentional and negligent infliction of emotional distress, all arising out of the Bell Atlantic litigations. They subsequently sought

leave to amend their complaint to add a claim for malicious prosecution. HLM moved for judgment on the pleadings pursuant to Rule 12(c), Ariz. R.Civ. P., arguing that the only claim that could be brought against opposing counsel as a result of prior litigation was a claim for malicious prosecution, and that the Gileses could not prove such a claim as a matter of law, given the fact that the prior litigation had settled. The trial court granted HLM's motion and dismissed their "complaints." This appeal followed.

Abuse of Process

5. The Gileses first argue that the trial court erred in finding that Arizona law prohibits an abuse of process claim against opposing counsel. Citing *Linder v. Brown & Herrick,* 189 Ariz. 398, 943 P.2d 758 (App. 1997), and *Lewis v. Swenson,* 126 Ariz. 561, 617 P.2d 69 (App. 1980), HLM responds, as it persuaded the trial court, that the only claim that may be brought against opposing counsel is a claim for malicious prosecution. In *Linder,* Division One of this court upheld the dismissal of the plaintiff's claims of fraud and intentional infliction of emotional distress against opposing counsel in a previous action, finding the claims not only insufficiently pleaded, but precluded by an earlier judgment. The court nevertheless went on to state that, in Arizona, case law limits claims against opposing counsel to malicious prosecution.[1]

[1]HLM points out that if the underlying matter is civil, the correct terminology is "wrongful institution of civil proceedings," rather than "malicious prosecution," a term technically based upon behavior in an underlying criminal action. *Lane v. Terry H. Pillinger, P.C.,* 189 Ariz. 152, 939 P.2d 430 (App. 1997). Because most of the cases use these terms interchangeably and for the sake of consistency and convenience, we follow suit.

In reaching that conclusion, Division one relied on *Green Acres Trust v. London,* 141 Ariz. 609, 688 Hines, 123 Cal. Rptr. 237, 240 (App. 1975), as follows:

> Clearly, an adverse party is not an intended beneficiary of the adverse counsel's client. If a cause of action exists against attorneys..., it must be pleaded as an action for malicious prosecution. We see no reason to extend applicable law now found in cases involving attorneys and third parties when there is sound and recognized public policy for limiting the cause of action to malicious prosecution.

The factual context of *Lewis,* however, is pertinent. That case involved allegedly improper questioning and testimony during trial. After examining the law of defamation and the public policy of affording litigants and their attorneys the freedom to "state anything at trial which relates to the matter at issue," 126 Ariz. At 564, 617 P.2d at 72, the court concluded:

> For the same reasons of public policy which dictate granting an absolute privilege to witnesses and attorneys from suits for defamation for statements made in the course of trial, we believe there is a privilege to attorneys at trial to ask questions of witnesses which have a relation to the proceedings without fear of subjecting themselves to a civil action for damages by an opposing litigant.

Id. At 565, 617 P.2d at 73.

6. We agree with the Gileses that *Linder* and *Lewis* are not controlling for several reasons. First, they are distinguishable because neither involved an abuse of process claim. They addressed only the question of whether negligence or fraud claims could be asserted against opposing counsel. Although HLM argues "the same kind of conduct is at issue here, and, indeed, there

are similarities between the Gileses' non disclosure claims and the fraud allegations in *Linder*, as the Gileses point out, those allegations involved "actions taken or representations made to the court in connection with a trial or court hearings." Given the legal and public policy foundations of *Linder*, we decline to apply it beyond its specific facts.

7. In both *Linder* and *Lewis*, the public policy for not permitting fraud and negligence claims against opposing counsel was premised upon the absolute privilege from defamation afforded participants in judicial proceedings. In *Green Acres Trust*, relied upon by the *Linder* court, our supreme court stated, "The socially important interests promoted by the absolute privilege in this area include the fearless prosecution and defense of claims which leads to complete exposure of pertinent information for a tribunal's disposition... The defense is absolute in that the speaker's motive, purpose or reasonableness in uttering a false statement do not affect the defense." 141 Ariz. At 613, 688 P.2d at 621. None of these considerations, however, is implicated in an abuse of process action.

8. Significantly, the court in *Green Acres Trust* declined to extend the defamation privilege to the attorneys' conduct at issue in that case, the making of extra-judicial statements to the press. The court observed that "[a]n attorney has a duty to represent his or her clients zealously. But an attorney has as compelling an obligation to avoid unnecessary harm to an adversary." *Id.* At 615, 688 P.2d at 623, *quoting Schulman v. Anderson Russell Kill & Olick, P.C.* 458 N.Y.S.2d 448, 455 (Sup. Ct. 1982). Because an attorney's duty to vigorously represent a client is limited by rules of law and principles of ethics and professionalism, *see Norton*, it is not "chilled" by any threat of liability for abuse of process for behavior

beyond those constraints. Indeed, "[t]he privilege an attorney has for his actions in representing a client is a qualified one that does not extend to the intentional torts of malicious prosecution and abuse of process." *McElhanon v. Hing,* 151 Ariz. 386, 394,728, P.2d 256, 264 (App. 1985), *vacated in part on other grounds,* 151 Ariz. 403, 728 P.2d 273 (1986). Thus, the public policy invoked in *Linder* and *Lewis* does not exist for abuse of process claims. Accordingly, HLM's contention that its actions in the underlying litigation were privileged is without merit.

9. We note that in *Norton,* the California court stated that actions against opposing counsel sounding in simple negligence would subvert "the public policy of favoring free access to our courts." 123 Cal. Rptr. at 241. The court observed that malicious prosecution provides a remedy to wrongfully sued defendants while requiring a more demanding standard of proof than negligence claims. *See also Bird v. Rothman,* 128 Ariz. 599, 627 P.2d 1097 (App. 1981)(simple negligence an improper standard upon which to base liability of an attorney to an adverse party). Similarly, the tort of abuse of process requires a more demanding standard of proof than mere negligence, while providing a remedy to those who are harmed by misuse of judicial process. The essential elements of such a claim are an ulterior purpose and a willful act in the use of judicial process not proper in the regular conduct of the proceeding. *Nienstedt v. Wetzel,* 133 Ariz. 348, 651 P.2d 876 (App. 1982); *see also* Restatement (Second) of Torts section 682 (1977). Liability will result only when the attorney's awareness that his or her action "will necessarily subject the opposing party to additional legal epenses...progresses to a sense of purpose, and, in addition the utilization of the procedure for the purposes for which it was designed becomes so lacking in justification as to lose its legitimate

function as a reasonably justifiable litigation procedure." *Nienstedt,* 133 Ariz. At 354, 651 P.2d at 882.

10. Contrary to HLM's suggestions, neither *Nienstedt* nor *Bird* supports a different result in this case. HLM points out that the defendant attorney in *Nienstedt* had represented himself in the underlying action and distinguishes the abuse of process claim upheld in that case as having been brought against him in his capacity as a party, not an attorney. Division One, however, discussed his conduct in his role as an attorney:

> **We recognize that the utilization of virtually any available litigation procedure by an attorney will generally be accompanied by an awareness on that attorney's part that his action will necessarily subject the opposing party to additional legal expenses. The range of feeling in the initiating attorney evoked by that awareness might well vary from instances of actual indifference to instances of intense satisfaction. By our holding in this case we do not intend to suggest that liability for abuse of process should result from either of the said instances alone.... As previously stated, there was evidence presented here of many instances from which a trier of fact could have concluded that the ulterior or collateral purpose of appellant Manfred Wetzel to subject the Nienstedts to excessive litigation expenses was in fact his primary purpose, and that his use of various legal processes was not justified or used for legitimate or reasonably justifiable purposes of advancing appellants' interests in ongoing litigation.**

133 Ariz. At 354, 651 P.2d at 882. Furthermore, although we upheld the granting of summary judgment disposing of the appellant's abuse of process claim against opposing counsel in *Bird*, it was because there was insufficient

evidence to create a material question of fact, not because such a claim was disallowed under Arizona law. *See also McElhanon.*

11. Many other jurisdiction allow a cause of action against opposing counsel for abuse of process. *See Bull v. McCuskey*, 615 P.2d 957 (Nev. 1980) (sufficient evidence to go to jury in physician's action against attorney for abuse of process); *Board of Education v. Farmingdale Classroom Teachers Ass'n, Inc.*, 343 N.E.2d278 (N.Y. 1975) (complaint stated cause of action for abuse of process against attorney for teacher's associatin); *Clausen v. Carstens*, 730 P.2d 604 (Or. App. 1986) (sufficiently alleged cause of action for abuse of process against wife's attorney where husband alleged they procured receiver over his business for ulterior purposes); *Ely v. Whitlock*, 385 S.E. 2d 893 (Va. 1989) (plaintiff attorneys sufficiently alleged abuse of process claim against opposing counsel in prior action); *see also Keen v. Ruddy*, 784 P.2d 653 (Alaska 1989) (finding plaintiffs failed to prove opposing counsel abused process); *Alumet v. Bear Lake Grazing Co.*, 732 P.2d 679 (Idaho App. 1986) (although counterclaims against plaintiff's counsel for malicious prosecution and abuse of process were properly dismissed from declaratory judgement action, subsequent proceedings on those claims were still available to defendant); Restatement (Second) of Torts & 682 cmt. a, illus. 3 (19770 (describing attorney behavior that results in abuse of process liability to opposing litigant). *But see Taco Bell Corp. v. Cracken*, 939 F. Supp. 528 (N.D. Tex. 1996) (under Texas law, abuse of process claim not permitted against opposing counsel in prior action). Viewing the allegations of the Gileses' complaint as true, *One Single Family Residence*, we conclude they sufficiently alleged a viable abuse of process claim, and that such a claim is not precluded under Arizona law.

Malicious Prosecution

12. The Gileses next contend that the mere existence of a settlement does not bar a claim for malicious prosecution, and the trial court was required to determine whether the settlement was in fact favorable to them before dismissing their claim. In an action for malicious prosecution, the plaintiff must show the defendant instituted a civil action which was motivated by malice, begun without probable cause, terminated in favor of the plaintiff, and damaged the plaintiff. *Lane v. Terry H. Pillinger*, P.C., 189 Ariz. 152, 939 P.2d 430 (App. 1997). Even though the underlying case was concluded by a settlement, rather than an adjudication on the merits, the termination may nonetheless be favorable to the plaintiff. *Bradshaw v. State Farm Mut. Auto Ins. Co.*, 157 Ariz. 411, 758 P.2d 1313 (1988); *Frey v. Stoneman*, 150 Ariz. 106, 722 P.2d 274 (1986). When there has been no adjudication on the merits, "the existence of a 'favorable termination' of the prior proceeding generally must be found in the substance rather than the form or prior events and often involves questions of fact." *Frey*, 150 Ariz. At 111, 722 P.2d at 279; *see also Bradshaw*, 157 Ariz. at 419, 758 P.2d at 1321 ("The true facts, not the form of disposition, are determinative.").

13. As the *Frey* court noted, there may be many reasons for the withdrawal or abandonment of a claim through settlement, other than lack of merit. These reasons include insufficient funds to pursue the action, a decision that any possible recovery was not worth the pecuniary or emotional cost of litigation, a decision "to forgive and forget or the defendant may have paid smart money or taken other measures, such as apology, to assuage plaintiff's anger."

APPENDIX J---ORDER—SUPREME COURT OF THE STATE OF ARIZONA—DATED OCTOBER 26, 1999

Supreme Court

STATE OF ARIZONA

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NOEL K. DESSAINT--------KATHLEEN E. KEMPLEY
CLERK OF THE COURT---CHIEF DEPUTY CLERK
s/ *Kathleen E. Kempley*
By: Kathleen E. Kempley

October 28, 1999

RE: CHARLES M. GILES / SUSAN P. GILES vs. HILL LEWIS MARCE

Supreme Court No.	**CV-99- 0216-PR**
Court of Appeals No.	**2 CA-CV 98-0033**
Pima County No.	**C310648**

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 26, 1999, in regard to the above- referenced cause:

Ordered: Petition for Review = DENIED

Chief Justice Zlacket recused himself and did not participate in the determination of this matter.

Record returned to Court of Appeals, Division Two, Tucson, this 28th day of October, 1999.

NOEL K. DESSAINT, Clerk

TO:
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A. James Clark, Esq., Clark & Associates
Peter Akmajian, Esq
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APPENDIX K---EXHIBIT A---FILED WITH PETITIONER'S PETITION FOR REHEARING--U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

1). The Amended Complaint fails to state a claim under Arizona law because *all of the alleged misconduct of Defendants is absolutely privileged under Arizona's litigation privilege.* (Pg. 6, Motion To Dismiss And Supporting Memorandum.)

2). *Under Arizona law, all such conduct in litigation by an opposing party is absolutely privileged* and cannot give rise to a cause of action for defamation or fraud. It has long been established that the litigation privilege applies to statements made in context of judicial proceedings. (Pg. 7.)

3). The privilege also applies to statements made in judicial pleadings if connected with or related to the subject of the inquiry. (Pg. 8.)

4). In addition, the Arizona Court of appeals has recently recognized that the litigation privilege bars fraud claims against the adverse party or counsel arising out of litigation conduct. *Linder v. Brown & Herrick,* 189 Ariz. 398, 943 P.2d 758 (Ct. App. 1997), review denied (Ariz. Sept. 16, 1997). (Pg. 8.)

5). As a result, Nicholson has not stated and *cannot state a claim under Arizona law,* and his complaint should be dismissed pursuant to Rule 12(b)(6). (Pg. 8.)

6). The Amended Complaint should be dismissed under Fed R. Civ. P. 12 (b)(6) because, under Arizona law, Nicholson cannot state a claim for defamation, fraud, or *any other tort based on litigation conduct.*

(Defendants' Reply In Support Of Their Motion To dismiss, Pg. 1.)

7). In view of Nicholson's Response, defendants are at a loss to know which causes of action the Amended Complaint is attempting to allege. The only identifiable cause of action is common law fraud, and as to that claim the Arizona Court or Appeals has spoken definitively. *Linder v. Brown & Herrick,* 189 Ariz. 398, 943 P.2d 758 (Ct. App. 1997), review denied (Ariz. Sept. 16, 1997). *Linder* squarely held that, under Arizona law, a party could not bring "claim of fraud against an opposing attorney for statements made during litigation. "Id at 406, 943 P.2d 69, 72 (Ct. App. 1980) (Pg 1.)

8). In response, Nicholson argues that *Linder* is distinguishable solely on the ground that it "did not involve the use of fraud concerning mail and/or wire fraud". Nicholson concedes, "there is no private right of action" on such theories. *Moreover, Nicholson does not explain how defendants' use of the telephone or mail would effect their absolute immunity under applicable law.* (Pg. 1.)

9). As explained in the Motion To Dismiss, all of the alleged claims against defendants should be dismissed as a matter of law. As to the state of law claims alleging misconduct by the defendants in the underlying case, *the conduct of a party in litigation is wholly privileged and cannot give rise to a secondary civil action.* See *Linder v. Brown & Herrick,* 189 Ariz. 398, 943 P. 2d 758 (Ct. App. 1997), review denied (Ariz. Sept. 16, 1997) (Pgs. 2 and 3, Defendants' Motion for Stay of Discovery and Supporting Memorandum.)

10). *Nicholson's frivolous, irresponsible complaint fails as a matter of law* and defendants should not be forced to

incur substantial legal bills responding and objecting to the intrusive interrogatories served by Nicholson not to mention the flurry of discovery request, that will surely follow. Third , staying discovery will avoid an inevitable flood of discovery disputes before the Court. Many of the interrogatories served by Nichoslon are objectionable on their face. Some of the interrogatories seek information that is obviously protected by the attorney client privilege. (Pg. 5.)

11). Nicholson should not be allowed to obtain unfettered access to defendants and their employees, as well as their files and records, simply by filing an unfounded complaint. (Pg. 7.)

12). For the foregoing reasons, defendants request that the Court issue an order staying all discovery in this case until the Court has ruled on Defendants' Motion to Dismiss.

13). For these reasons as well as those set forth in Defendants' main memorandum on this motion, this Court should grant the motion to stay discovery during the pendency of the motion to dismiss. (Pg. 3.) (Defendants Reply In Support of Motion To Stay Discovery)

14). Did the district court correctly dismiss Appellant's fraud and "injurious falsehood" claims *where the claims were based on alleged misconduct by opposing parties and their counsel in a prior litigation, and conduct in litigation is absolutely privileged under Arizona law?* (Pg. 1, Brief of the Appellees.)

15). Appellees moved to dismiss the state-law tort claims on the ground that Arizona law did not recognize a cause of action against an opposing party or its counsel

for fraud, defamation, *OR OTHER TORTS COMMITTED IN THE COURSE OF LITIGATION.* (Pg. 3.)

16). The district court also dismissed Nicholson's state-law tort claims on the ground that *"THEY ALL ARISE OUT OF LITIGATION CONDUCT AND SUCH CLAIMS CANNOT BE BROUGHT BECAUSE OF ARIZONA'S LITIGATION PRIVILEGE.* (Id. At 6 (citations omitted).) (Pg. 4.)

17). The district court below correctly dismissed Appellant's Amended Complaint with prejudice. Appellant asserted various tort claims arising under Arizona law, including "injurious falsehood" and fraud, against his opponents in a prior state court action and their counsel in that action, all of which claims were based on alleged misconduct during the course of that prior litigation. *Under uncontroverted Arizona law, however, such alleged litigation misconduct is absolutely privileged, and a party may not base subsequent tort claims on such alleged misconduct.* The district court properly dismissed Appellant's state-law tort claims under the controlling Arizona precedent on the litigation privilege. (Pg. 9.)

18). *The Amended Complaint Fails to State a Claim under Arizona law. All of Appellees' Conduct Was Privileged Under State Law.* The district court correctly held that the Amended Complaint failed to state a claim under Arizona law because *all of the alleged misconduct of Appellees is absolutely privileged under Arizona's litigation privilege.* (Pg. 11.)

19). As the district court recognized, under Arizona law *all such conduct in litigation by an opposing party is*

absolutely privileged **and cannot give rise to a cause of action for defamation or fraud. (Pg. 12.)**

20). In addition, the Amended Complaint alleges a laundry lists of types of offenses without explanation. (SER3, 29 (listing 35 offenses "and other crimes known and unknown to Plaintiff along with numerous BAR Association Ethics Violations yet to be enumerated"); Id. 107 (listing 27 Arizona statutes and two federal criminal statutes on mail and wire fraud).) (Pg. 12.)

21). In addition, the Arizona Court of Appeals has recently recognized that the litigation privilege bars fraud claims against the adverse party or its counsel arising out of litigation conduct. *Linder v. Brown & Herrick,* 189 Ariz. 398, 943 P.2d 758 (Ct. App. 1997), review denied (Ariz. Sept. 16, 1997).

22). The district court properly dismissed the state-law claims under the Arizona litigation privilege, citing *Linder and Green Acres Trust.* (CR 41, at 5-6) (Pgs. 13 and 14.)

23). *Rather, they invoked clear Arizona law, which rejects causes of action in tort for litigation conduct by an opposing party.* (Pg. 14.)

APPENDIX L—42 U.S.C SECTION 1983

SECTION 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.